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What the Saiban-in System Brought from the Perspective of a Defense Lawyer

MEGUMI WADA**

I. Introduction

A white-collar crime case triggers surprise and criticism overseas to the Japan's criminal justice system. Mr. Carlos Ghosn, a former CEO of the Japan-based automobile companies, was arrested in November 2019. He was taken to the Tokyo Detention Center where he was detained for 22 days prior to indictment with the charge of underreporting compensation. Since then, the media critically reported the situations that Mr. Ghosn was in: while the prosecutors interrogated him for several hours every day, he had no right to have his defense counsel present at interrogation. He was prohibited from seeing his family at the detention center. This recognized businessperson was detained for 108 days in total until he was released on bail.¹

I introduce another example of the lengthy detention to show you that this high-profile case is not exceptional at all. I represented a Canadian citizen who was arrested with possessing a tiny amount of cannabis while he stayed in Tokyo for a vacation. One day, he went to a bar in Roppongi, which was a well-known district for nightlife in Tokyo. There he made a mistake. He bought a small amount of marijuana, which is criminally prohibited in Japan. While he was walking on the street, this Canadian male was stopped by two police officers. He was required to show his ID but he did not keep it with him. The police asked for a body search and found 0.8g of cannabis from his pockets. Subsequently, my client was arrested and detained for 23 days in total prior to the indictment.

Long-term detention prior to indictment is one of the characteristics of Japan's criminal legal system. A suspect is entitled to apply for bailout only

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1. Later in April 2019, Mr. Ghosn was arrested again while he was released on bail. After detained for 20 days, he was released on the second bail.

after the indictment. However, bail application is rarely granted especially when the accused denies the charge and claims innocence. The courts often reason that the defendants' attitudes of denying the charges indicate substantial risk of tampering evidence, which the law enumerates as one of the grounds denying a bail request. Mr. Ghosn's case made such practice more visible as "Hostage Justice System," which significantly pressures the defendants to give up claiming innocence in exchange for getting bail granted.

During the investigation stages, the law enforcement zealously pursue to obtain confessions from the suspects, because they know that the suspects' incriminating statements are crucial at trials. Indeed, the criminal trials tend to focus on examining the written statements made during the investigation, instead of calling witnesses.² The result of trials is significant. The conviction rate is extremely high as 99%.³

Imagine what working criminal defense lawyer looks like in such a system. It is devastating. Motion against detention order is rarely granted. Victory rarely comes at trial even though you are a great advocate. Clients sometimes give up claiming your innocence in exchange for release upon bail.

II. Changes that Saiban-in System Brought to Japan's Criminal Justice System

Saiban-in system, which started in 2009, brought dramatic changes to Japan's legal system. It accompanied some reforms such as video recording of interrogations.⁴ The new system also brought some positive changes to the practices, which I will focus on in this article.

A. Specialization in Criminal Defense Lawyering

First, saiban-in trials led to specialization in criminal defense work. Previously, the both parties were allowed to read aloud written statements and the judge read them later in their study. While you made oral arguments

2. A leading law professor Ryuichi Hirano sharply criticized such practice and even described that "the criminal trials in Japan are hopeless." He emphasized the importance of introducing a jury system to change the system. Ryuichi Hirano, *Diagnosis on Current Criminal Procedure*, in CELEBRATING DR. DANDO SHIGEMITSU' 70TH BIRTHDAY, Vol. 4 (Yuhikaku, 1985).

3. According to the data the Supreme Court and the Public Prosecutor's Office have published, the conviction rates from 2009 (calculated by dividing the number of the not-guilty verdicts by the number of the cases where a defendant pleaded not guilty) were 0.0% (2009), 0.4% (2010), 1.6% (2011).

4. Code of Criminal Procedure was amended in 2016 to make it mandatory for police and prosecutors to electronically record the entire interrogation process after arrest. It came into effect in June 2019. However, the requirement applies only to criminal cases that would be tried in lay judge trials, such as murder cases, and some white-collar crime cases that the prosecutors initiate the investigation of.

zealously in front of the judges, they looked down to read the other documents. Such practices did not require the skill of trial advocacy. However, they are not acceptable anymore under the new system that the Saiban-in act requires prosecutors and defense counsels to provide arguments and evidence in an easily understandable way.⁵ Trials need to be understandable at once in the courtrooms so that lay judges are able to form their opinion based on trial hearings. Through the experiences of saiban-in trials, the judges also have found examining witnesses the most reliable way for fact-findings rather than examining dossiers of statements. The defense counsels realized that they need to be skilled enough to advocate for their clients. Such changes made the criminal defense lawyering work specialized and rewarding.

Japan Federation of Bar Associations (“JFBA”) have organized seminars that provide the lawyers across the country with the opportunities of acquiring in learning-by-doing styles. In August 2007, a group of the Japanese lawyers attended a 5-days training program of National Institution of Trial Advocacy (“NITA”).^{6,7} In the following year, JFBA invited the NITA instructors to Japan. Learning from the NITA method, the leading criminal defense lawyers established the trial advocacy seminars. Since then, a lot of young criminal lawyers proactively have taken these practical classes, which are found very effective. The attendees of the seminars achieved the results of not-guilty verdicts in trials. Some of the local bar associations mandate the lawyers as requirements to take the classes to be in the list of court-appointed counsels for a saiban-in trial case.⁸

B. Strengthening the Evidence Rules

Second, saiban-in system strengthened evidence rules. The Japanese legal system has a basic concept of evidence rules similarly with the U.S. system, such as hearsay and relevancy. However, the judges did not much regard these rules and allowed the evidence at their own broad discretion. After the saiban-in system was introduced, the judges have realized that they cannot disregard the evidence rules anymore in order to keep the saiban-ins

5. Saiban-in Act, Article 51.

6. National Institution of Trial Advocacy is a nonprofit organization created by legal professionals. Since 1971, they have provided legal advocacy skills with the lawyers in and outside the U.S.; <https://www.nita.org>.

7. Takashi Takano, *Teaching Trial Advocacy - an experience of attending a NITA training program*, 53 QUARTERLY CRIMINAL DEFENSE MAGAZINE 56, at 56–61 (Gendai-Jimbun-sha, 2008).

8. Daini-Tokyo Bar Association and Osaka Bar association set such requirements in 2017.

away from prejudicial or misleading evidence.⁹

In 2012, the Supreme Court of Japan made a landmark decision on the issue of relevancy, specifically the admissibility of prior convictions in an arson case. The defendant was charged with trespass, theft and arson. He admitted that he trespassed a house and stole instant noodle to eat, but denied the arson. For the purpose of proving arson, the prosecutor tried to introduce into evidence that he was previously convicted of arson eleven times. In response the district court excluded them and found the defendant not guilty for arson.¹⁰ The intermediate appellate court, however, found the defendant's prior convictions for arsons admissible on the ground that they had a characteristic similarity with the case, and reversed the acquittal on the charge of arson.¹¹ The defendant appealed. The Supreme Court unanimously quashed the appellate court decision, finding that the evidence of the defendant's prior convictions inadmissible.¹² The court established the evidence rule to prohibit the use of character evidence unless the prior convictions had significant characteristics.¹³

Now I see the changes in practice that the judges rely on the evidence rules more than before. Here is an example of the case of bodily injury causing death I represented as a defense counsel. My client was indicted with slapping his daughter-in-law who was a 10-month baby at that time. This assault caused the baby to hit her head on the wall and die two months later. My client pleaded guilty for the charge and the issue was sentencing only. The prosecutor tried to introduce into evidence the two photos of the victim when she was alive. They formally explained that the photos would prove that the victim was able to walk around upright at the time of the incident, but they obviously intended to appeal the saiban-ins' emotions by showing that the victim was an adorable baby so that they would find more harsh sentencing against my client. The court found these photos

9. Several judges author articles on evidence rule relying on the U.S. system. For example, Sasaki Kazuo, a then judge of Nagoya High Court, introduced Federal Rule of Evidence 403 and 404 to address how the judges should decide the admissibility of evidence. Sasaki Kazuo, *Relevancy or admissibility of evidence-examination of evidence in Saiban-in trials*, CRIMINAL TRIALS IN A NEW ERA at 187 (HANREI TIMES SHA, 2010).

10. Judgment of Tokyo District Court dated July 8, 2010.

11. Judgment of Tokyo High Court dated March 29, 2011 (HANREI TIMES, No. 1354, 250).

12. Judgment of Supreme Court dated September 7, 2012 (KEISHU, Vol. 66, No. 9, 907).

13. The defense counsel Takashi Takano made oral argument in the Supreme Court as follows: "We have a reason to keep and strengthen the evidence rule of prohibition of character evidence. It's saiban-in system. The objective of saiban-in system is to reflect healthy social common sense of citizens to fact-findings under criminal justice system. The fact-findings must be based on evidence. We must prevent wrongful convictions from being brought by misleading and prejudice. Evidence rule is necessary to make it possible that juries make decisions fairly and properly." The transcript of the oral argument Takano made is available on his blog: http://blog.livedoor.jp/plltakano/archives/cat_60242085.html.

inadmissible, reasoning that they serve no purpose other than inflaming the saiban-ins and thus are too prejudicial and outweigh the necessity of examining the evidence.

C. Are Bail Applications Being Granted More Often?

Third, the saiban-in system brought some favorable changes to the detention system. Since 2008, one year before the saiban-in system started, the judges have denied the detention requests from the prosecutors more than before.¹⁴ Also, the rates of the courts' granting motion against detention requests has been gradually increasing.¹⁵ These are explained as the outcomes of introducing the saiban-in systems, which led the legislators to expand the scope of the scope of the court-appointed defense counsel system.¹⁶ Under the new system, a defense counsel became more available to the suspects in custody from the early stage of investigation, which allowed them to prepare for making arguments with gathering any materials supporting the arguments. Also, specialization of criminal defense lawyering made motivated lawyers to file motions more proactively.¹⁷

So, what about the bailouts? According to the statistics officially issued by the Supreme Court of Japan, the ratios of the bailouts granted have been increasing. While the ratio of the bailouts in 2006 was 14.47%, that of 2016 was 29.78%.¹⁸ This number indicates that bails practices are getting more improved. However, we need to keep in mind that those statistics do not

14. While the rate of judges' denying the detention requests was 0.719% in 2008, the number has been gradually increasing and that of 2018 was 4.49% (In Tokyo only, the rate reached to 9.78%). The data is available at http://www.moj.go.jp/housei/toukei/toukei_ichiran_kensatsu.html.

15. The Supreme Court publishes the numbers of the motions granted which was filed under CCP 429, not the motions granted against the detention order. However, according to the news report, the successful rate of granting motions against detention order was 0.47% in 2005, that of 2016 reaches to 2.71%, SANKEI NEWSPAPER, Mar. 28, 2016.

16. Previously, before September 2006, the court-appoint counsels had not been assigned to the suspects prior to indictments. In October 2006, the law was introduced to make it available for detained suspects of certain types of serious felony cases to request for a court appointed counsel. In May 2009, the scope of the system was expanded to include detained suspects of cases punishable with the death penalty, life imprisonment, imprisonment with or without labor for more than three years. Furthermore, the CCP was amended in 2016 to expand the scope of court-appointed counsels to all the cases where a detention order is issued against the suspect. It came into effect in June 2018.

17. Multiple local bar associations, such as Kyoto, Saitama and Osaka, have been working through on the issues by encouraging their members to file motions against the detention orders. See Masatoshi Naganuma, *Significance, results and vision of the movements by Saitama bar association to file motions against all the unnecessary detentions*, 98 QUARTERLY CRIMINAL DEFENSE MAGAZINE 10 (Gendai-Jimbun-sha, 2019).

18. In 2008, the numbers of the individual granted for bailout was 10,333 while those detained after indictments was 71,389. In 2016, each of the numbers was 15,275 and 51,288.

care how long it took from the date of indictments until the bailouts. Saiban-in trials accompany the pretrial conferences, which usually take several months until a trial starts. Therefore, even though a defendant is released upon bail prior to the first trial date, it may mean that the defendant was detained for six months. The statistics is unclear on this point. Additionally, “the hostage justice system” still exists. According to the data provided by the Supreme Court to the Japan Federation of Bar Associations, the ratio of the bailouts for the defendants who contested the charge was 9.9%, while that for the defendants who admitted the charge was 89.8% in 2016. This clearly shows the fact that when you claim innocence, it will be extremely difficult to get the bailouts granted.

III. Victim Participation in Trials

An important feature of the Saiban-in system is victims’ participations in trials, which was introduced in December 2008. In this system, the victims are allowed to participate in trials in the ways such as questioning the witnesses as well as defendants¹⁹ and presenting their statements on sentencing.²⁰ The victims’ impact statements are controversial in the U.S.,²¹ but the problems are more significant in saiban-in trials, where the fact-findings and sentencing do not occur independently.

The Code of Criminal Procedure does not distinguish between the processes of fact-finding and sentencing.²² This means that the court examines the evidence for guilt and then hears victims’ statements on sentencing before they deliberate on the fact-findings and reach a verdict of conviction. It is totally understandable that the victims’ impact statements give influence on the trier of facts when they determine guilty or not.²³ Although some judges try to make a trial bifurcated in innovative ways,²⁴ the majority of courts do not.

Additionally, Code of Criminal Procedure provides the measures of

19. CCP Articles 316-36, 316-37.

20. CCP Article 316-38.

21. Hans, V. P., *The impact of victim participation in Saiban-in trials in Japan: Insights from the American jury experience*, INT’L J. OF LAW, CRIME & JUSTICE (2013), <http://dx.doi.org/10.1016/j.ijlcrj.2013.07.002>.

22. There is only one provision in the Rules of Criminal Procedure on this point. RCP Art. 198-3 provides that efforts shall be made to conduct the examination of evidence on circumstances that are clearly unrelated to the facts of the crime as separately as possible from the examination evidence that is related to the facts of the crime.

23. The study shows that the victims’ statements of opinion for sentence may influence lay judges’ guilty verdicts. Yuji Itoh, *Does a victim’s statement of opinion influence lay judges’ finding of fact?*, JAPANESE J. OF LAW & PSYCHOLOGY, Vol. 15 No. 1, (2015).

24. MUNEHISA SUGITA, THEORY AND PRACTICE OF SAIBAN-IN TRIAL IN JAPAN (2012), at 193.

protecting the witnesses when they testify at trial, such as placing a large screen between the witness and the defendant so that they cannot see each other²⁵ and allowing the witness to testify in the other place in the courthouse with using devices transmitting visual images and sound to the courtroom where the judges and the defendant are present.²⁶ Such measures support the victims testifying at trial psychologically.²⁷ At the same time, however, they have significant problems as they may inflict the defendants' rights to confront the witness against them face-to-face.²⁸ Nevertheless, the judges frequently allow the prosecutors to use them upon their requests. Reportedly, they are used when an eyewitness testifies, and even when an accomplice testifies.

IV. Conclusion

Saiban-in systems brought favorable outcomes to the Japanese criminal justice system. It made the courtrooms more active, leading to give the defense lawyering enthusiasm and professionalism. I do believe that the changes are not limited to the cases tried in lay-judge system but also to the bench trial cases. Whether the saiban-in systems will strengthen the rights of defendants and improve our criminal justice system depend on how we the lawyers practice every day.

25. CCP Article 157-5.

26. CCP Article 157-6.

27. According to the data published by the Supreme Court of Japan, more victims who participated in trials request to have the measurements of placing shields. While the number of using the shields was 50 out of 560 in 2009, it was 147 out of 1,297 in 2013 and 362 out of 1,485 in 2018.

28. The Supreme Court found that such measures do not violate the constitutional right to cross-examine the witnesses against him/her. Judgment of Supreme Court dated April 14, 2005 (KEISHU Vol. 59, No. 3, 259).
